IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3316 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JAGDISH CHOLERA

Versus

HARESH S CHAVDA

Appearance:

MR ND NANAVATI, Senior Advocate with Mr R M Chhaya, Advocate for the petitioner

MR YN OZA for Respondent No. 1

MR JS YADAV for Respondent No. 2

Rest of the respondents - SERVED BY DS

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 24/04/96

ORAL JUDGMENT

By way of this Special Civil Application under Article 226 and 227 of the Constitution of India, the petitioner has challenged the order of the learned District Judge, Junagadh in Civil Misc. Application No.175/94 dated 26.4.1995 whereby the learned Judge has ordered for recounting of the entire votes polled at the

Junagadh Municipality Election of Ward No.10.

The brief facts giving rise to the present writ petition are that the petitioner having secured highest number of votes though with the margin of 2 votes only, he was declared elected a Councillor for ward No.10 of Junagadh Municipality in the elections held in December, 1994. The defeated candidate- Respondent No.1 challenged the said election by way of filing election petition before the Distrtict Judge, Junagadh. The case of the election petitioner is that some ballots were carrying identification mark as name of the village Dubli written thereon and as such, objection in that regard was raised and prayer was made for recounting. Returning officer conceded the request for recount, but he ordered for recount of rejected ballots only as a initial measure, which was undertaken. The Returning Officer thereafter rejected the prayer for recount of entire ballot papers. After receiving the reply, the learned District Judge directed the parties to file affidavit to prove their cases. The Court framed following points:

"1. Whether the prima facie case for recounting has been made out ?

2. What order ?"

The learned Judge, after hearing the parties, accepted the prayer for recount on the ground that though the Returning Officer was satisfied initially for recount, in order to minimise the labour he initially confined it to 138 rejected ballots, but then he was unjustified in declining for entire recount. The Court expressed the view that in such a situation, even if no details have been pointed out, the prayer for recount should not be declined.

2. I have heard Mr N D Nanavati, learned Sr. Advocate for the petitioner and Mr J S Yadav, for respondent No.2. It is contended by Mr Nanavati that the learned Judge adopted an approach which is perverse being in disregard to settled position of law in the matter of order of recount in election matters. It is submitted by Mr Nanavati that the order of recount cannot be made simply on the mere possibility of error. He further submits that there cannot be any order only for the reason that there is a small margin of votes. He referred to various decisions of the Apex Court. Those are 1980 (2) SCC 537, 1993 (Suppl.) SCC 82, 1990

(Suppl.)SCC 616, 1989 (1) SCC 526, and a judgment of those Court reported in 1996 (1) GLR 11. I have gone throught all the judgments cited by the learned Advocate for the petitioner. I do not propose to burden this judgment by dealing with all those cases for the reason that law on the subject is absolutely clear and in fact the learned Judge has referred to some of the decisions of the Apex Court and he has rightly understood the law which is evident from the ratio of the cases as stated by him, the extract of which is as under:

> "Thus, it is clear that unless there is cogent evidence for irregularity having been committed in the process of counting brought on record, the order for recount is utterly unjustified and the same can hardly be conceded to the petitioner as a matter of course on the presump[tion that because of the continuity of the process throughout night the staff was tired and the error was human."

Thus, the only question that poses itself for decision in this Civil Application is whether the settled law on the recount has been correctly applied by the District Judge in the facts of the case ?

3. It is contended by Mr Yadav, learned Advocate for the respondent that there is no error apparent on the face of record, and therefore, it is not a fit case which calls for interference by this Court in exercise of powers under Article 226 and 227 of the Constitution of India. The first case on which the learned Counsel relied is the decision in the case of Ms.LABHKUWAR v. JANARDHAN, reported in AIR 1983 SC 535. In that case, the question was with respect to the date of subletting, and there was a finding of fact arrived at on appreciation of evidence by both the lower courts. In view of this, the Apex Court held that the High Court ought not to have interfered in exercise of powers under Article 226 with respect to the question which is purely based on facts. In the case of STATE OF MAHARASHTRA vs. HARISHCHANDRA & Ors., reported in 1986 SC 1192, the Apex Court held that finding of fact could not be set aside by the Court in exercise of powers under Article 227 with respect to the question which is purely of facts. The third case relied upon by the petitioner is the decision in the case of CHANDRAVARKAR SITA RATNA RAO v. ASHALATA, reported in AIR 1987 SC 117. In that case, the Apex Court held that no interference is called for in a finding of fact by the High Court in exercise of Articles

226 and 227 of the Constitution of India, unless the finding is perverse or is based on no evidence which may result in manifest injustice.

4. In my view, none of the case is of any help to the petitioner in the facts of the case. As already stated, the question for consideration in the case in hand is the application of settled law on admitted facts. Thus, the question involved is of approach and not of appreciation of facts. From the breadroll of the decisions of the Supreme Court, broad guidelines is discernible, that the Court would be justified in ordering a recount or permitting inspection of ballot papers only where all the material facts pertaining to allegations of irregularity or illegality in counting are adequately pleaded in the petition and the election petitioner offers a prima facie proof of errors in counting.

In the present case, it is not in dispute that no material facts with respect to allegations of illegality in the counting has been pleaded in the election petition. No proof of irregularity or illegality of whatsoever nature has been offered. The learned Judge has ordered recount on the single ground that even the Returning Officer had conceded recount in absence of material facts being pointed out. The finding of the learned Judge can be extracted as follows:

"It is true that the petitioner has not produced the document about the discrepancy noticed by him, but this is spelled out from the record of the Returning Officer himself. Now when the Returning Officer is satisfied initially for its recounting prayer of a candidate and only for saving of labour, he initially confines it to 138 rejected votes and thereafter on everything being found alright, he takes that matter as a concession for relinquishing the prayer of recount of the whole votes of the Ward by the objector is totally unjustified and, in my opinion, so far as this Ward is concerned, the claim of recoaunt will have to be accepted in light of the situationp that even the Returning Officer has also not considered it to be worth rejecting on the ground that no details have been pointed out."

The reasoning of the learned Judge being in disregard to the settled position of law is obviously erroneous and misplaced and this deserves to be quashed and set aside by this Court in exercise of powers under Articles 226 and 227 of the Constitution of India.

5. In view of the aforesaid, this Special Civil Application is allowed and the judgment and order passed by the learned District Judge, Junagadh dated 26.4.1995 ordering recount is quashed and set aside.

Rule made absolute accordingly. No order as to costs.

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